IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 289 of 2006
In
COMPANY PETITION No. 190 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BANK OF INDIA - Applicant(s)
Versus
O.L OF APS STAR INDUSTRIES LTD - Respondent(s)

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Appearance :
MR AS VAKIL for Applicant(s) : 1,
MR RD DAVE for Respondent(s) : 1,
MS AMEE YAJNIK for Respondent(s) : 1,
MR RAJESH P MANKAD for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 28/06/2007
JUDGMENT

Present Judge's Summons has been taken out by Bank of India claiming to be a creditor of

APS Star Industries Ltd., of whom the Official Liquidator attached to this Court is appointed as 'Provisional Liquidator pursuant to the order passed by this Court in Company Petition No. 190 of 2003 for an appropriate order permitting the Receiver appointed vide order dated 18.8.2003 by the Debts Recovery Tribunal, Ahmedabad in Original Application No. 14 of 2003 to sell the hypothecated properties of the Company – APS Star Industries Limited in terms of the subsequent order dated 28.3.2006 passed by the Debts Recovery Tribunal, Ahmedabad in O.A. No. 14 of 2003.

2. It is the case on behalf of the applicant - so stated in the application and affidavit in support of the Judge's Summons that the Company, APS Star Industries Ltd., was initially carrying on business in the name of “Suessen Textile Bearings Limited” and subsequently the name of the company was changed to 'APS Star Industries Limited' and thereafter to its present name. It

is further submitted that the Company filed Reference Case No. 28 of 1998 before the BIFR under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 [“SICA” for short] and the company was declared 'sick' under Section 3(1)(o) of SICA on 31.7.1998 and IDBI was appointed as the Operating Agency under Section 17(3) of SICA. It is submitted that at the hearing of Reference Case on 14.2.2002 the BIFR issued certain directions qua the order dated 14.2.2002 and more particularly as contained in paragraph 28 thereof whereby the applicant along with other secured creditors were permitted to file/continue the Suit which they had already filed with a condition that any decree/award could be executed only with the specific approval of the Board and no coercive steps would be taken by them during the said period. It is submitted that in view of the aforesaid permission ranted by the BIFR, the applicant Bank filed Original Application No. 14 of 2003 before the Debts Recovery Tribunal at

Ahmedabad and prayed for to issue a Recovery Certificate for an aggregate amount of Rs. 3,64,41,860.78 ps. with further interest from 16.1.2003 upto realisation and it was requested to issue the Recovery Certificate against the Company and other opponents and the said amounts be directed to be realized from all the respondents jointly and each of them severally by sale of the mortgaged property described in Schedule 'A' thereto and from all the personal assets of respondents No. 2 and 3 therein. It is submitted that the applicant also prayed for various interim reliefs. It is further submitted that the Debts Recovery Tribunal by its ex-parte interim order dated 21.1.2003 granted certain interim reliefs and also to appoint a Court Commissioner and to make inventory of the hypothecated securities. It is submitted that in terms of the said order dated 21.1.2003 the Commissioner has prepared a report dated 25.2.2003. It is submitted that thereafter BIFR passed a further order dated 26.3.2003 wherein

the BIFR formed a prima facie opinion that the Company cannot be revived on a long-term basis and that it is just and equitable that the Company should be wound up. It is submitted that in terms of of the order dated 26.3.2003 a public notice was published on 31.3.2003 in the 'Indian Express', Vadodara Edition (dated 15.4.2003). It is submitted that thereafter BIFR by his further order dated 26.6.2003 confirmed its prima facie opinion formed on 26.3.2003 to wind up the company in terms of Section 20(1) of SICA. That the said opinion was forwarded to this High Court along with earlier orders/proceedings for further necessary action according to law. It is submitted that the Board Opinion received by the Registry of this Court is registered as “Company Petition No. 190 of 2003”. It is submitted that Special Civil Application No. 11078 of 2003 was filed by one Engineering Mazdoor Sangh for quashing and setting aside the order dated 26.6.2003 passed by the BIFR in Case No. 28 of 1998 and for some other reliefs. It is submitted

that thereafter the Debts Recovery Tribunal, vide its order dated 18.8.2003 passed an order appointing Manager of the applicant Bank or an officer appointed by him as 'Court Receiver' and directed the Court Receiver to submit his report within 3 weeks from the date of receipt of the order. It is submitted that the Court Commissioner submitted his report dated 5.11.2003 to the DRT and thereafter the DRT has passed a further order dated 10.11.2003. It is submitted that thereafter the applicant Bank has preferred an application dated 3.1.2004 (Exh.A/16) in the Debts Recovery Tribunal, Ahmedabad, and prayed for a relief permitting and authorising the Receiver appointed vide order dated 18.8.2003 to invite offers either by public advertisement or private negotiations for sale of the hypothecated plants, machineries and stocks which are exclusively charged/given by way of security to the applicant Bank and to place the same before the DRT for acceptance and permit the applicant Bank to appropriate the sale proceeds towards its

dues. It is further submitted that pending further proceedings before the DRT including the Application (Exh.A/16), the Company Petition No. 190 of 2003 along with other company petitions and Special Civil Application No. 11078 of 2003 came up for hearing before the learned Single Judge of this Court, i.e., Company Court and the learned Single Judge of this Court [Coram: Mr. K.A. Puj, J.] by his common order dated 9.1.2006 admitted the Company Petition No. 190 of 2003 and has appointed Official Liquidator attached to this Court as 'provisional liquidator' of the company who was directed to take charge of all the properties and units of the Company and has further directed to issue Public Advertisement in two local newspapers, one in English newspaper and other one in vernacular language having wide circulation in the State of Gujarat, Maharashtra and Karnataka. It is submitted that various directions have been issued by this Court in the aforesaid Company Petition No. 190 of 2003. It is submitted that pursuant to the said order

dated 9.1.2006, the Official Liquidator has taken over possession of the company's assets at Vadodara in terms of the minutes dated 10.2.2006. It is submitted that thereafter the DRT was pleased by its order dated 28.3.2006 to allow the applicant Bank's application (Exh. A/16) by appointing the Branch Manager of the applicant Bank as Receiver for selling the hypothecated properties keeping in view the provisions of the 2nd Schedule to the Income Tax Act. It is submitted that the Debts Recovery Appellate Tribunal has by its order dated 28.3.2006 stayed further proceedings of OA No. 14/2003 before the DRT, Ahmedabad. It is submitted that in view of the aforesaid the applicant Bank has preferred the present Company Application for permission of this Hon'ble Court to permit the Branch Manager of the applicant Bank who is appointed as Receiver for selling the hypothecated securities.

2.1. An additional affidavit dated 5th May 2007 affirmed by the Chief Manager of the applicant

Bank is filed submitting that the applicant, Bank of India would like to remain outside the winding up proceedings for the purpose of selling the hypothecated properties as per order dated 28.3.2006 passed by the DRT in OA No. 14 of 2003.

3. Shri Apurva Vakil, learned advocate appearing for the applicant Bank has submitted that pursuant to the order passed by the BIFR the applicant Bank was permitted to file a suit who has filed OA No. 14 of 2003 and thereafter by order dated 28.3.2006 the DRT has allowed the applicant Bank's Application [Exh.A/16] by appointing the applicant Bank's Manager as 'Receiver' for selling the hypothecated properties. Relying upon the decision of the Hon'ble Supreme Court in the case of ***Rajasthan State Financial Corpn. And Another. Vs. Official Liquidator and Another,*** reported in **(*2005) 8 S.C.C. 190*** Shri Vakil has submitted that the applicant Bank/Receiver appointed by the DRT may be permitted to sell the hypothecated properties

lying with the applicant Bank with assistance of the Official Liquidator and under the supervision of the Company Court and that the proceeds may be held by the Official Liquidator until they are distributed in terms of Section 529 of the Companies Act under supervision of the Official Liquidator. He has also relied upon the decision of the learned Single Judge of this Court in the case of ***State Bank of India Vs. Provisional Official Liquidator of Volvo Steel Ltd, formerly known as Stanrose Steel Ltd.,*** reported in ***122 Company Cases Page 440*** whereby in similar set of circumstances the learned Company Court has allowed the financial institutions/Bank to sell the properties hypothecated/mortgaged with the assistance of the Official Liquidator and under overall supervision of the Company Court and it is requested to allow the present application and grant the reliefs as prayed for.

4. The application is opposed by the Company. Shri A.L. Shah, learned advocate has

appeared on behalf of the company, APS Star Industries Ltd., and has submitted that at present the company is not under liquidation and only a provisional liquidator is appointed and therefore as such the application is not maintainable. He has further submitted that the present Company Application No. 289 of 2006 has become infructuous in view of the order passed by the learned Single Judge of this Court in Company Application No. 236 of 2006 as well as in OJCA No. 337 of 2006 [dated 8.3.2007] by which the application submitted by the Company for various reliefs and directions to the Official Liquidator came to be allowed and the company, its authorised representatives including Technical Consultants were permitted to have a trial run of the machineries and equipments at the Company's factory units at Vadodara and other places wherever/whenever so required in order to enable the company to file necessary revival scheme to this Court under Section 391/394 of the Companies Act, 1956. It is submitted that the company is

in the process of filing a revival scheme under Section 391/394 of the Companies Act, 1956 and during the said process if the relief as prayed for is granted in that case the application/scheme of revival to be submitted by the company would be infructuous and the purpose of submission for revival scheme would be frustrated and therefore it is requested to dismiss the present application.

5. Heard the learned advocates appearing on behalf of the respective parties. At the outset, it is required to be noted that Company Petition No. 190 of 2003 is registered pursuant to the opinion of the BIFR dated 26.6.2003 forming the opinion that it is just and equitable that the company should be wound up. The Company Petition No. 190/2003 has been admitted by this Court and the same was ordered to be advertised, and by order dated 9.1.2006 the Official Liquidator attached to this Court is appointed as provisional liquidator of the company who has

taken charge of all the properties of the units of the company inclusive of all the properties hypothecated with the applicant Bank. Prior thereto, pursuant to the permission granted by the BIFR dated 14.2.2002 the applicant Bank has preferred O.A. No. 14 of 2003 before the DRT, Ahmedabad for issuance of Recovery Certificate and much prior to forwarding of opinion dated 26.3.2003 by the BIFR, the DRT has issued certain interim reliefs. That thereafter as stated above by order dated 9.1.2006 the Company Court has admitted Company Petition No. 190 of 2003 and passed the order of appointing Provisional Liquidator of the Company and thereby the provisional Official Liquidator is in possession of all the properties of the company [in liqn.]. Thus, prior to the order of admission and appointment of the provisional Official Liquidator the applicant Bank has already exercised their rights to recover their dues under the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993, and

by order dated 28.3.2006 the DRT has appointed Branch Manager of the applicant Bank as 'Receiver' for selling the hypothecated properties. However, in view of the order dated 9.1.2006 passed by this Court by which the Official Liquidator attached to this Court is appointed as 'provisional liquidator' and was directed to take possession of all the properties of the company in liquidation and consequently the provisional liquidator is in-charge of all the properties of the company [in liqn.] including the properties hypothecated with the applicant Bank. The applicant Bank has preferred the present application for the aforesaid reliefs to permit the Receiver appointed by the DRT to sell the hypothecated securities/properties of the company pursuant to the order dated 28.3.2006 on any terms and conditions, i.e., with the assistance of the provisional Official Liquidator and under overall supervision of the Company Court.

6. The identical question came to be considered by the Hon'ble Supreme Court in the case of *Rajasthan State Financial Corporation and Another (supra)*. The Hon'ble Supreme Court, after considering the provisions of the State Financial Corporations Act, 1951; Recovery of Debts Due to Banks and Financial Institutions Act, 1993, and other debts and financial loss vis-s-vis relevant provisions of the Companies Act, 1956, has observed and held in Paragraphs No. 17 and 18 as under;

> *"17. Thus, on the authorities what emerges is that once a winding-up proceeding has commenced and the Liquidator is put in charge of the assets of the company being wound up, the distribution of the proceeds of the sale of the assets held at the instance of the financial institutions coming under the Recovery of Debts Act or of financial corporations coming under the SFC Act, can only be*

with the association of the Official Liquidator and under the supervision of the Company Court. The right of a financial institution or of the Recovery Tribunal or that a financial corporation or the court which has been approached under Section 31 of the SFC Act to sell the assets may not be taken away, but the same stands restricted by the requirement of the Official Liquidator being associated with it, giving the Company Court the right to ensure that the distribution of the assets in terms of Section 529-A of the Companies Act takes place. In the case on hand, admittedly, the appellants have not set in motion any proceeding under the SFC Act. What we have is only a liquidation proceeding pending and the secured creditors, the financial corporations approaching the Company Court for permission to stand outside the winding up and to sell the properties of the company-in-liquidation. The

Company Court has rightly directed that the sale be held in association with the Official Liquidator representing the workmen and that the proceeds will be held by the Official Liquidator until they are distributed in terms of Section 529-A of the Companies Act under its supervision. The directions thus, made, clearly are consistent with the provisions of the relevant Acts and the views expressed by this Court in the decisions referred to above. In this situation, we find no reason to interfere with the decision of the High Court. We clarify that there is no inconsistency between the decisions in Allahabad Bank v. Canara Bank and in International Coach Builders Ltd. v. Karnataka State Financial Corpn. In respect of the applicability of Sections 529 and 529-A of the Companies Act in the matter of distribution among the creditors. The right to sell under the SFC Act or under the Recovery of Debts Act by a

creditor coming within those Acts and standing outside the winding is different from the distribution of the proceeds of the sale of the security. The distribution in a case where the debtor is a company in the process of being wound up, can only be in terms of Section 529-A read with Section 529 of the Companies Act. After all, the Liquidator represents the entire body of creditors and also holds a right on behalf of the workers to have a distribution pari passu with the secured creditors and the duty for further distribution of the proceeds on the basis of the preferences contained in Section 530 of the Companies Act under the directions of the Company Court. In other words, the distribution of the sale proceeds under the direction of the Company Court is his responsibility. To ensure the proper working out of the scheme of distribution, it is necessary to associate the Official Liquidator with the process of sale so that he can ensure, in the

light of the directions of the Company Court, that a proper price is fetched for the assets of the company-in-liquidation. It was in that context that the rights of the Official Liquidator were discussed in International Coach Builders Ltd. The Debts Recovery Tribunal and the District Court entertaining an application under Section 31 of the SFC Act should issue notice to the Liquidator and hear him before ordering a sale, as the representative of the creditors in general.

18. In the light of the discussion as above, we think it proper to sum up the legal position thus:

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery officer but

only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(ii) A District Court entertaining an application under Section 31 of the SFC Act will have the power to order sale of the assets of a borrower company-in-liquidation, but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(iii) If a financial corporation acting under Section 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or

the reserve price, confirmation of the sale, holding of the sale proceedings and the distribution thereof among the creditors in terms of Section 529-A and Section 529 of the Companies Act.

(iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realisation of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation."

In the case of *State Bank of India [supra],* the similar question came to be considered by the learned Single Judge of this Court following the decision of the Hon'ble Supreme Court in the case of Rajasthan State Financial Corporation [supra].

The learned Single Judge [Company Court] has allowed the Bank to sell the properties of the company [in liqn.] with the assistance of the Official Liquidator and under the overall supervision of the Company Court and held that the amount so realised shall be distributed under Section 529-A of the Companies Act, 1956, i.e., paying the dues of the workers pari passu.

7. So far as the submission on behalf of the Company that the Company is not under liquidation and only a provisional liquidator is appointed and therefore the present Company Application is not maintainable is concerned, it is required to be noted that the Provisional Liquidator is having all the powers of Official Liquidator as he is charge of all the properties of the Company [in liqn.]. Considering the various provisions of the Companies Act, 1956, so far as the powers exercised by the Provisional Liquidator are concerned, the provisional Official Liquidator can exercise all the powers of the Official

Liquidator. It is also required to be noted that the applicant Bank has already filed an Affidavit submitting that the applicant Bank would like to remain outside the winding-up proceedings for the purpose of selling hypothecated properties. The right of the applicant Bank to sell the hypothecated assets of the Company and realise the securities by invoking the powers under the provisions of the Recovery of Debts Due to the Banks and Financial Institutions Act, 1993, has been recognised by the Hon'ble Supreme Court in the aforesaid decision. However, subject to the rider that the same can be done after notice to the Official Liquidator and after appropriate permission from the Company Court and acting terms of the directions issued by the Company Court as regards associating the Official Liquidator with the sale, the fixing of the upset price/reserve price, confirmation of the sale, holding of sale proceeds and distribution thereof amongst the creditors in terms of Section 529-A and Section 529 of the Companies Act.

7.1. Now, so far as the submission on behalf of the Company that they are proposing to submit a revival scheme under Section 391 & 394 of the Companies Act, 1956 and if the applicant Bank/Receiver appointed by the Debts Recovery Tribunal is prior to sale of hypothecated properties and the proposed scheme will become infructuous and therefore no permission should be granted is concerned, it is required to be noted that till date the revival scheme has not been submitted. Apart from that, the applicant Bank is having independent right to recover the dues by selling the hypothecated securities by invoking the provisions of the Recovery of Debts Due to the Banks and Financial Institutions Act, 1993 by remaining outside the winding-up proceedings and the said right has been recognised by the Hon'ble Supreme Court in the aforesaid decision subject to certain conditions and riders. Under the circumstances, merely because the company is proposing to submit

revival scheme under Section 391 and 394 of the Companies Act, 1956, the applicant Bank cannot be restrained from exercising their rights of recovery under the aforesaid Act.

8. Under the circumstances, considering the fact that the applicant Bank has already exercised their rights to recover the amount by selling the hypothecated securities by filing Original Application No. 14 of 2003 much prior to the passing of order of admission of the Company Petition and appointment of provisional Official Liquidator and that the applicant Bank has submitted that they would like to remain outside the winding-up, and that an order has already been passed by the DRT appointing Branch Manager of the applicant Bank as 'Receiver' for selling hypothecated properties and considering the decision of the Hon'ble Supreme Court in the case of *Rajasthan State Financial Corporation* [supra], the present Company Application is allowed in part and the Receiver appointed by the DRT and

the applicant Bank are permitted to sell the hypothecated properties in association with the provisional Official Liquidator under the overall supervision of the Company Court. The Receiver/applicant Bank is directed to have a fresh Valuation Report of the hypothecated properties within the period of four weeks from today and submit the same before this Court for fixing the upset price/reserve price; thereafter for inviting offers by giving advertisement in local newspapers having wide circulation; and thereafter for submission of offers before this Court for confirmation of sale with the condition that the amount so realised shall be deposited with the provisional Official Liquidator so that the same can be distributed, as observed by the Hon'ble Supreme Court in the aforesaid decision. However, it is made clear that the aforesaid direction is on the basis that the order dated 28th March 2006 passed by the DRT below Application dated 3.1.2004 [Exh.A/16] is in operation and/or if the said order is challenged

before the Appellate Tribunal, the same shall be subject to the order of the Appellate Tribunal.

9. With these, the present Company Application is allowed to the aforesaid extent. No costs.

[M.R. Shah, J.]

rmr.